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No. 91-1594

In The

Supreme Court of the United States

October Term, 1992

FRED H. EDENFIELD, et al.,

Petitioners,

v.

SCOTT FANE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF AMICUS CURIAE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, in Support of Petitioners

KENNETH R. HART*
STEVEN P. SEYMOE
AUSLEY, MCMULLEN, MCGEHEE,
CAROTHERS & PROCTOR
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

**Counsel of Record for Amicus Curiae*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Florida's prohibition of direct, in-person, uninvited solicitation of potential clients by licensed Certified Public Accountants (CPAs), enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is an unconstitutional restriction of a CPA's First Amendment right of commercial speech?

2. Whether a state prohibition of direct, in-person, uninvited solicitation of potential clients by licensed Certified Public Accounts (CPAs), enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is a valid, time, place, and manner restriction of a CPA's First Amendment right of commercial speech?

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CONSENT OF THE PARTIES

Petitioners, Fred H. Edenfield, et al., and Respondent, Scott Fane, have consented to the Florida Institute of Certified Public Accountants participating in these proceedings as Amicus Curiae in support of Petitioners. Their consents have been filed with this Court.

INTEREST OF AMICUS CURIAE

The Florida Institute of Certified Public Accountants ("FICPA") is a Florida not-for-profit corporation with its principal place of business in Tallahassee, Florida. Founded in 1905, FICPA is an active professional organization of approximately 18,000 Certified Public Accountants ("CPAs"), working to improve the accounting profession and to serve the public better. The FICPA is the fifth-largest state CPA organization in the United States. Its membership is comprised of practitioners in public accounting, industry, government and education. Other membership categories include associate members, retired CPAs, and CPAs domiciled outside the State of Florida.

One of the primary purposes of the FICPA is to encourage the analysis, discussion, and understanding of issues related to the accounting profession. This includes monitoring the scope of services provided by CPAs in Florida and throughout the United States, monitoring legislation affecting the practice of public accountancy, assisting in the development of auditing, accounting and ethical standards, and educating the public with regard to the responsibilities of CPAs. These areas of activity bear directly on the issues now before this Court.

FICPA was not involved in the trial of this matter, but participated in the appeal before the Eleventh Circuit Court of Appeals as Amicus Curiae in support of Petitioners. FICPA was granted consent to file a brief in this matter as Amicus Curiae in support of Petitioners by counsels for Petitioners and Respondent.

SUMMARY OF ARGUMENT

The Eleventh Circuit Court of Appeals upheld the Northern District Court of Florida's decision declaring unconstitutional Florida's prohibition on the direct, uninvited, in-person solicitation by certified public accountants ("CPAs") for remunerative employment. The Eleventh Circuit's decision is contrary to precedents of this Court and should be reversed.

In a number of decisions, this Court has consistently recognized that uninvited, in-person solicitation presents a potential for abuse that is not present in other forms of communication. Because of this potential, uninvited, in-person solicitation may actually disserve the informational function protected by the First Amendment and, as such, is an appropriate target for regulation by the states.

Enacted pursuant to its police powers, Florida's prohibition serves to maintain the standards of the accounting profession and to protect consumers from the evils of fraud, undue influence, invasion of privacy, overreaching, intimidation, and other forms of "vexatious conduct." Florida has a compelling interest in the development and regulation of its professions. The inherent inequality in the relationship between a professional and the consumer of such services creates a clear potential for abuse. Accordingly, Florida's prohibition directly furthers the State's interest, and the Eleventh Circuit erred in its analysis.

In addition, Florida's prohibition is narrowly tailored to accomplish its purposes. Because of the potential for abuse, no other regulation is available that would be as effective as

an outright prohibition. Accordingly, Florida's prohibition should be declared constitutional.

Alternatively, the Eleventh Circuit's decision should be reversed as disputed issues of fact remain, precluding the award of summary judgment in favor of Respondent.

ARGUMENT

The issues before this Court concern a state's right to regulate professions within its borders in order to maintain the ethical standards of the state's professions and in order to protect its consumers. Pursuant to its police powers, Florida has enacted a prohibition on the direct, in-person, uninvited solicitation by certified public accountants for remunerative employment.[1] The Northern District Court of Florida declared the prohibition unconstitutional, which the Eleventh Circuit affirmed, holding that Florida's prohibition did not further the State's interests and was not narrowly tailored to that interest.

The Eleventh Circuit Court of Appeal's decision is contrary to precedents of this Court, which recognize a state's interest in the regulation of its professions and in the protection of its consumers. The Eleventh Circuit Court of Appeals' decision is also contrary to a decision by Florida's Fourth District Court of Appeals issued immediately prior to

[1]This Brief is filed in support of Petitioners, Fred H. Edenfield, et al., and should be considered in conjunction with Petitioners' Brief on the Merits. In order to avoid unnecessary repetition, Amicus has not duplicated the arguments contained in Petitioners' Brief.

the Eleventh Circuit's decision, which declared the exact same prohibition constitutional. *See State of Florida v. Rampell*, 589 So. 2d 1352 (Fla. 4th DCA 1991), *appeal docketed*, no. 79,371 (Fla. February 17, 1992). If allowed to stand, the Eleventh Circuit's decision will substantially curtail Florida's and other state's attempts to regulate professions operating within their borders. Because consumers place their trust in members of professions, denying states the latitude to regulate professions will have a material and adverse impact on states and their ability to regulate professions in order to protect consumers of professional services.

I. FLORIDA'S PROHIBITION ON UNINVITED, IN-PERSON SOLICITATION BY CPAs DOES NOT VIOLATE THE FIRST AMENDMENT

Through a series of decisions, this Court has recognized that although commercial speech is entitled to some degree of protection under the First Amendment, this protection must be balanced against a state's interest in maintaining the standards of its professions and in protecting its consumers. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Peel v. Atty. Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990).

Florida has a strong state interest in the practice of accountancy and has historically subjected the practice to

regulation, pursuant to the State's police power. *See First Fla. Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990); *Heller v. Abess*, 134 Fla. 610, 184 So. 122 (1938). This Court has also recognized the strong state interest that states have in the regulation of the practice of accountancy. *See United States v. Arthur Young and Co.*, 465 U.S. 805 (1984). Florida's regulation of uninvited, in-person solicitation of new clients by CPAs was enacted by the State pursuant to its police powers in order to maintain the standards of the accounting profession and to protect consumers from the evils of fraud, undue influence, invasion of privacy, overreaching, intimidation, and other forms of "vexatious conduct."

In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), this Court articulated a four-prong test for determining the constitutionality of governmental restrictions on commercial speech. That test requires that first, the speech at issue concern a lawful activity and not be misleading; second, the regulation must serve a substantial governmental interest; third, the regulation must directly further the asserted state interest, and finally, the regulation must be no more extensive than necessary to achieve the state's interest. *Id.* at 566.

In applying *Central Hudson*, the Eleventh Circuit Court of Appeals found that Florida's prohibition met the first and second prongs of the test, but that it failed the third and fourth prongs, *i.e.*, that the prohibition further Florida's interest and that it be no more extensive than necessary to

achieve the State's interest. The Eleventh Circuit erred both legally and factually.

A. THE PROHIBITION DIRECTLY FURTHERS FLORIDA'S INTEREST IN REGULATING CPAs.

1. The Decision is Contrary to *Ohralik v. State Bar Ass'n*

In *Ohralik v. State Bar Ass'n*, this Court upheld a prohibition similar to the one challenged here, but for direct, in-person solicitation by attorneys. Rejecting the assertion that in-person solicitation was on a par with truthful advertising, the Court found that special problems, not present with other types of advertising, arise with regard to uninvited, in-person solicitation:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision-making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.... In-person solicitation is as likely as not to discourage persons ... from engaging in a critical comparison of the "availability, nature and prices." ... [I]t actually may disserve the individual and societal interest, ... in facilitating "informed and reliable decision-making."

Ohralik, 436 U.S. at 458. These special problems arise because uninvited, in-person solicitation is "*inherently* conducive to overreaching and other forms of misconduct," and the only effective manner of regulating the potential for misconduct is through a complete prohibition of this type of solicitation. *Ohralik*, 436 U.S. at 457-58, 464 (emphasis added). Accordingly, given a state's compelling interest in maintaining standards for its professions and in preventing fraud, undue influence, intimidation, invasion of privacy, overreaching and other forms of vexatious conduct, a state may, in the limited instance of in-person solicitation, enact an outright, prophylactic ban on such communication based solely on the potential for such abuses. *Id.* at 462-66.

In *Shapero v. Kentucky Bar Ass'n*, a prohibition on direct-mail solicitation was challenged. This Court rejected the assertion that this type of solicitation presented the same potential for abuse as in-person solicitation: "face-to-face solicitation [is] a 'practice rife with the possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud'" and "unique ... difficulties ... would frustrate any attempt of in-person solicitation short of an outright ban." *Id.* at 475. Because direct-mail solicitation suffers from none of these problems, this Court struck the prohibition on direct-mail solicitation and reaffirmed its support of a prohibition on in-person solicitation.

Although this Court has been confronted with numerous forms of commercial promotion, only the abuses inherent with in-person solicitation have justified a blanket prohibition of such speech. The focus of this Court's commercial

speech decisions has been the protection of the right to disseminate information, the dissemination of which facilitates the decision-making process for consumers. *Virginia Pharmacy*, 425 U.S. at 748. Because in-person solicitation is inherently conducive to overreaching and other forms of misconduct, such solicitation does not serve the informational function protected by the First Amendment, but may actually disserve such:

> [I]n-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment .... In-person solicitation by a lawyer of remunerative employment is a *business transaction* in which speech is an essential but subordinate component. While this does not remove the speech from protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny.... [In-person solicitation] falls within the State's proper sphere of economic and professional regulation ... [and] appellant's conduct is subject to regulation in furtherance of important state interests.

Ohralik at 455, 457, 459 (emphasis added).

This Court's analysis in *Ohralik* applies equally as well to Florida's prohibition on uninvited, in-person solicitation by a CPA. Like the prohibition in *Ohralik*, uninvited, in-person solicitation by a CPA is a business transaction, and "does not stand on a par with truthful advertising about the availability and terms of the services to be provided." Here, Respondent does not seek to convey information which

cannot be delivered by any other means, but rather seeks to solicit for remunerative employment, which is nothing more than a business transaction. Such speech serves the First Amendment little, if at all, and the State may regulate such in accord with its interest in maintaining the standards of its professions in order to prevent the potential for abuse.[2] Numerous other methods are available by which Respondent could provide the information he seeks to convey, including through advertisement and direct-mail solicitation. Respondent could then solicit fully, once he has been invited.

Recent decisions have also recognized the potential for abuse inherent with in-person solicitation. In *International Society for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992), in-person solicitation was found to present "risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable .... The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase." *Id.* at 4753. And in *United States v. Kokinda*, 497 U.S. 720 (1990), this Court upheld a prohibition on the uninvited solicitation of funds on government property.

In both decisions, this Court recognized that the abuses inherent with in-person solicitation, along with a state's

[2]A number of other states also prohibit uninvited, in-person solicitations by CPAs. *See Fane v. Edenfield*, 945 F.2d 1514, 1516 (11th Cir. 1991). In addition, the Department of Treasury prohibits uninvited, in-person solicitation by a CPA. *See infra* at 15.

interest in managing its property, justified the burden on commercial speech. Here, the State's interest in the practice of accountancy and protecting consumers justifies the regulation.

2. The States have a Compelling Interest in their Professions, Including the Practice of Accountancy

The Eleventh Circuit erred in its understanding of the State's interest in the prohibition at issue. The Eleventh Circuit found that Florida has a strong state interest in the regulation of accountancy, but then limited the State's interest in the prohibition solely to protecting the provision of attest services by CPAs: "The Board argues that the ban is necessary to protect a CPA's integrity, independence, and objectivity while performing the attest function." *Fane*, 945 F.2d at 1517.[3] The prohibition, however, is broader than that and serves to prohibit the in-person solicitation by a CPA for all accounting services, not simply the solicitation for attest services.

Undeniably, states have a compelling interest in the development and regulation of their professions. The services of a professional differ significantly from the provision of other goods or services, including for example, the potential for confusion with regard to the nature and need for such services and the absence of a standardized

[3]Attest services refer to the issuance of an independent opinion regarding a client's financial stability in an audit or review of a client's financial statements. Only CPAs may perform this function.

product. *See, e.g., Virginia Pharmacy, supra*. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), this Court commented:

> We recognize that the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."

Id., 421 U.S. at 792 (emphasis added)(citations omitted). *See also Ohralik, supra*, (state bears special responsibility for maintaining standards among its professions). Further,

> [A]dvertising by professions poses special risks of deception ... 'because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.'

In re R.M.J., 455 U.S. 191; 200 (1982) (citations omitted).

Characteristics common to all professions include: (1) the requirement of extensive learning and training; (2) a code of ethics imposing standards above those normally tolerated in the marketplace; (3) a disciplinary system for members who breach this code; (4) a primary emphasis on social responsibility over individual gain, and the corresponding duty of its members to behave as members of a disciplined and honorable profession; and (5) the prerequisite of

a license prior to admission to practice. *Lincoln Rochester Trust Co. v. Freeman*, 355 N.Y.S.2d 336, 339 (1974).

The practice of accountancy is today accepted as a profession. *Fane*, 945 F.2d at 1520. *See also Pierce v. A.A.L.L.* Insurance Co., 531 So. 2d 84 (Fla. 1988). CPAs in Florida are subject to licensure and must complete advanced educational requirements above and beyond that established for a baccalaureate degree in order to be considered for admission to practice in the State. In addition, CPAs must pass a CPA examination and a character and fitness examination, much like an attorney. Once admitted to practice, CPAs are governed and controlled by Chapter 473, Florida Statutes, and the rules adopted by the Florida Board of Accountancy, which incorporate a code of ethics.[4] Failure to adhere to the State's requirements may subject the CPA to disciplinary proceedings. § 473.323(1), Fla. Stat. In addition, CPAs must continue their education after admission through continuing education requirements. § 473.312, Fla. Stat. Today, Florida properly considers the practice of accountancy a profession and has a compelling interest in it, along with its other professions, for a number of reasons.

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[4]Those regulations incorporate ethical and fiduciary standards in the provision of professional accounting services comparable to those required for lawyers. § 473.301, Fla. Stat. (1991). Like an attorney, the regulations extend to all accounting services a CPA provides, not just those services which only a CPA may provide, such as attest services.

First, members of professions, because of their education and training, possess specialized knowledge which the ordinary consumer is unable to acquire themselves, without great difficulty. Second, the person seeking advice is often in great need of the professional's assistance and is dependent upon the professional providing the assistance. Third, because of the inherent inequality in the relationship, the consumer is ill-equipped to evaluate the professional's competence and must place his trust in the professional. And fourth, the professional is not an island unto himself, but is part of a professional community which lends credence and identity to the professional, further supporting the inequality of the relationship. Because this inherent inequality is common to all professions, the State, today and historically, has a legitimate concern that a professional will use this specialized knowledge to the disadvantage of the consumer.

The disparity between professionals and others forms the basis for such prohibition, not only as to lawyers but also as to doctors, CPAs, psychiatrists, and other professions. Numerous states have enacted prohibitions on uninvited, in-person solicitation and include, for example, statutory prohibitions against the uninvited solicitation by optometrists,[5] health care professionals,[6] and dentists.[7]

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[5]*See, e.g.*, Del. Code Ann. tit. 24, § 2113(7)(f)(1987); Minn. Stat. Ann. § 148.57 (West 1989).

[6]*See, e.g.*, Ky. Rev. Stat. Ann. § 438.065 (Michiel Bobbs-Merrill 1985); La. Rev. Stat. Ann § 37:1743 (West Supp. 1992).

Furthermore, an overwhelming number of states prohibit a professional from utilizing a solicitor to solicit employment.[8]

Like attorneys, CPAs acquire knowledge and expertise indispensable in today's society but which even the most sophisticated lay person would find confusing. Although this circumstance does not mean that CPAs will take advantage of a client, it is the *possibility* that CPAs might use their specialized knowledge to solicit a potential client that justifies the State's interest in the communication and the regulation of this communication.[9]

In his dissent to the Eleventh Circuit's decision in this case, Judge Edmonson correctly found that the practice of accountancy, like the practice of law, is a highly-skilled and technical profession in which years of education and training are necessary. The potential for confusion as to the nature

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[7]*See, e.g.*, Minn. Stat. Ann. § 150A.11 (West 1989); Mont. Code Ann. § 37-4-502 (1991); S.C. Code Ann. § 40-15-190(17) (Law. Co-op. Supp. 1990).

[8]*See, e.g.*, Ariz. Rev. Stat. Ann. § 32-854.01(6) (1986 & Supp. 1992) (podiatry); Cal. Bus & Prof. Codes § 2273 (West 1990 & Supp. 1992) (physician); Colo. Rev. Stat. Ann. § 12-35-118(1)(s) (1991) (dentist); Haw. Rev. Stat. § 453-8(a)(2) (1985 & Supp. 1989) (physician); Md. Health Occ. Code Ann. § 14-404(a)(14) (1991 & Supp. 1991) (same); S.C. Code Ann. § 40-55-150(14) (Law. Co-op. 1986 & Supp. 1990) (psychologists).

[9]Proof of actual harm is not required; rather, a state may prohibit such solicitation based on the potential for misconduct. *Ohralik*, 436 U.S. at 466-67; *Shapero*, 486 U.S. at 472; *In re Primus*, 436 U.S. 412 (1978)(showing of potential danger sufficient). Because in-person solicitation is inherently conducive to abuse, that potential exists for attorneys and other professions, including CPAs.

and need for such services by laymen is as great for accounting services as it is for legal services. Indeed, the services provided by CPAs and attorneys are, in certain situations, identical. For example, in the area of tax practice, both tax attorneys and CPAs may provide identical tax-related services and the reasons that support a prohibition against in-person solicitation by attorneys in these situations apply equally to CPAs. In these instances, the prohibition of uninvited, in-person solicitation of prospective clients serves precisely the same function. There is no rational distinction between permitting a state to prohibit attorneys from in-person solicitation of prospective tax clients but to hold a similar prohibition of in-person solicitation by CPAs for the same services unconstitutional.

The Eleventh Circuit's decision is also contrary to a decision issued three weeks prior to the Eleventh Circuit's decision by Florida's Fourth District Court of Appeals in *State of Florida v. Rampell*, declaring the same prohibition constitutional, and specifically finding that the State's interest in regulating in-person solicitation is a result of the profession's specialized knowledge and the inherently coercive nature of such communications:

> Whether the solicitation is by a lawyer or a CPA, pressure can be exerted on a potential client to make a hasty and uninformed decision. While CPAs may not be trained in the art of persuasion, they are trained in the intricacies of taxes and financial statements which even the most sophisticated lay person finds confusing. We are not so naive as to think that all CPAs would never take advantage of a client if allowed to personally solicit the client, any

> more than we think that all lawyers are "bad apples" who exploit every prospective client. It is the possibility of harmful solicitation and the knowledge of that -- whether by the door-to-door salesman, the attorney, or the CPA -- all in-person solicitation is particularly susceptible to abuse which allows the State to regulate such conduct.

Id. at 1357.

Respondent erroneously suggests that the State of Florida is isolated in its prohibition on in-person solicitation. As the Eleventh Circuit found, a number of other states, by statute or regulation, have enacted similar prohibitions. *See also supra* at 12. In addition, the Department of Treasury has also enacted a similar prohibition with regard to CPAs, attorneys, and enrolled agents practicing before the Internal Revenue Service and the Bureau of Alcohol, Tobacco, and Firearms. *See* 31 C.F.R. §§ 8.41 and 10.30. CPAs in every state are subject to the Department of Treasury's prohibitions when practicing before these federal agencies. When it was suggested to the Department that these prohibitions were unnecessary in light of *Ohralik*, the Department disagreed:

> The Department believes that the complexity of our tax laws and the anxiety which many taxpayers feel when confronted with matters such as examination of tax returns, imposition of tax liens and estate tax issues for bereaved family members of decedents indicate that, at this stage of our experience, limitations be placed on in-person solicitation. Hence to avoid the opportunity for overreaching, the invasion of a taxpayer's privacy and situations where the judgment of the practitioner on behalf of the client may be clouded by his own pecuniary self-interest,

> the prohibition on in-person solicitation is continued in the final regulations.

44 Fed. Reg. 17 (Jan. 1979).

Restrictions on in-person solicitation act as concrete, day-to-day reminders to the practicing CPA of why it is improper for any member of this profession to be regarded as a trade or occupation. This Court has recognized that the professions have been well served by the implementation of codes of ethics imposing certain standards beyond that prevailing in the market place. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 676-77 (1985); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975); *Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232, 247 (1957). This push for higher standards inures to the benefit of the State and its citizens, who knowingly or unknowingly, rely on the higher ethical standards for protection. The State clearly has a compelling interest in ensuring that natural forces do not conspire to transform its professions, including the practice of accountancy, into crafts or businesses.[10]

Ensuring that members of a profession place social responsibility above pecuniary gain, however, is a relentless struggle against the natural forces of economic self-interest.

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[10]The ability of a profession to impose standards on itself, however, is restricted. For example, in this case, the national organization for accountancy, American Institute of Certified Public Accountants, had enacted a prohibition on in-person solicitation but removed the prohibition after antitrust concerns were raised. Such concerns do not exist where the State imposes the standards.

As Justice O'Connor has stated, sermonizing alone will not provide these standards:

> One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market.

Shapero, 486 U.S. at 488-90. To deny states the latitude to enact prohibitions on such communications is to deny states the right to protect their citizens.

The Eleventh Circuit, however, ignored the State's concerns regarding professions, finding that "*other financial professionals,* such as non-certified accountants, bookkeepers, and tax preparers are not prohibited from utilizing personal contacts to solicit new clients." *Fane,* 945 F.2d at 1516 (emphasis added). The Eleventh Circuit erred in its understanding of the State's interest in regulating CPAs. Unlike CPAs, the other occupations are not considered professions and cannot hold themselves out as possessing the qualifications and skills that the title "CPA" provides. Because of the inherent inequality in the relationship between a professional and consumers, consumers must place their trust in professions, and it is not unreasonable for the State to condition its grant of special privilege and standing upon the acceptance of additional restraints.

3. The Eleventh Circuit Erred in Limiting *Ohralik* to those Professions Involving a Trained Advocate or to the Solicitation of the Emotionally Vulnerable.

The Eleventh Circuit also justified its refusal to apply *Ohralik* by asserting that *Ohralik* should be limited to those professions involving a "trained advocate," or to the solicitation of the "emotionally vulnerable." *Fane*, 945 F.2d at 1520. Nothing in *Ohralik*, or subsequent decisions which have cited to *Ohralik*, suggests that *Ohralik* should be so limited. Indeed, *Shapero* specifically rejected the premise that emotional vulnerability provides the predicate for imposition of a prohibition on solicitation, holding: "The relevant inquiry is not whether there exists potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptible belief." 486 U.S. at 474. Clearly, the prohibition approved in *Ohralik* applies not only to the solicitation of the emotionally vulnerable, but also to the solicitation of prosperous business clients, knowledgeable about financial matters and the provision of professional services. Absolutely no justification exists for the Eleventh Circuit to limit *Ohralik* to solicitation of the emotionally vulnerable.

Furthermore, although this Court has cited a lawyer's advocacy skills in its decisions, it has never indicated that this was the basis for its decisions. Rather, the focus of this Court's decisions has been upon the mode of communication and the potential for abuse. *See Shapero; Ohralik; Kokinda; Int'l Society for Krishna Consciousness, Inc.* This

potential exists whenever a professional uses his specialized knowledge to solicit in-person a potential client. To forbid a state from seeking to regulate such communications, except as to attorneys, adversely affects the state's ability to protect its consumers and effectively limits prohibitions of in-person solicitation to attorneys, funeral salesmen, and used car salesmen. *Fane*, 945 F.2d at 1520.

Moreover, contrary to the lower court's findings, there are instances where potential clients for accounting services are as susceptible to improper solicitation as personal injury victims. Such instances include, for example, taxpayers appearing before the I.R.S. For many taxpayers, that examination can be emotionally disconcerting, making the taxpayer susceptible to solicitation. Similarly, with regard to the provision of attest services, certain entities subject to regulatory action (*e.g.*, a savings and loan bank) or under threat of bankruptcy would also be susceptible to improper solicitation. Such an entity would be under immense pressure to present its financial information in a positive, unqualified manner. Undue influence, overreaching, and fraud are valid concerns in these instances. Indeed, Respondent acknowledges this potential in his Supplemental Affidavit where he admits that financial pressures might force a company to seek "to bend the rules" in order to obtain a "'clean' financial opinion." Supplemental Affidavit of Scott Fane at 4. In these instances, the State's concerns are just as great as they are for personal injury victims.

B. THE PROHIBITION IS NARROWLY TAILORED TO THE STATE'S INTEREST.

The Eleventh Circuit also erred in concluding that Florida's prohibition is more extensive than necessary to achieve the State's interest. The prohibition limits only the uninvited, in-person solicitation by the CPA. The prohibition does not prevent advertisement or targeted, direct mail solicitation of clients by CPAs. Respondent is free to identify prospective customers and target those clients for direct mail solicitation. He is prohibited only from initiating these acts by telephone or in person without invitation from the prospective client.

The Eleventh Circuit, however, as indicated above, failed to recognize that the State's interest in the prohibition runs to the entire practice of accountancy, and not simply the provision of attest services. On this error alone, the Eleventh Circuit struck the prohibition, believing it to be more extensive than necessary: "CPAs who specialize in many aspects of the accounting profession have no occasion to attest to the accuracy of audits or financial statements. If allowed at all, Florida's Statute must be narrowly tailored to achieve its anticipated objective." *Fane,* 945 F.2d at 1518.

The Eleventh Circuit also erred in holding that other regulatory requirements exist that can be utilized. As this Court found in *Ohralik* and *Shapero*, however, because of the special problems with in-person solicitation, no other effective regulation exists except an outright prophylactic ban. *Ohralik*, 436 U.S. at 466-67; *Shapero*, 486 U.S. at 473 (the "unique" regulatory problems of in-person solicitation justify a complete ban). Indeed, the regulatory requirements suggested by the Eleventh Circuit, requirements that the CPA be independent and not engage in any fraudulent or deceptive activity, along with the existence of tort liability, also exist with regard to attorneys. But these alternatives may only be utilized on an after-the-fact basis, based upon subsequent discovery of the misconduct. The State has a compelling interest in preventing such misconduct from occurring, which permits the State to apply remedies before the fact. No effective pre-screening mechanism, such as that approved in *Zauderer* for advertising, is available for in-person solicitation. As such, the prohibition passes the fourth prong of *Central Hudson* and should be declared constitutional.

II. SUMMARY JUDGMENT WAS NOT APPROPRIATE.

Alternatively, the Eleventh Circuit Court of Appeals erred as disputed issues of material fact remain, precluding the entry of summary judgment in favor of Respondent and requiring that the action be remanded to the lower court. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

In determining whether disputed issues of fact remain, the lower court must review the evidence in the light most favorable to Petitioners, accepting as true the evidence introduced by Petitioners. All reasonable doubts are to be resolved in favor of Petitioners. *Adickes,* 398 U.S. at 157.

Petitioners introduced the Affidavit of Louis Dooner, past chairman of the Florida Board of Accountancy, and an expert

in the field of accountancy. That Affidavit demonstrates the legitimate purpose and need for the regulation. *See* Affidavit of Dooner. In that Affidavit, Mr. Dooner avers that such regulation is necessary to preserve the integrity and independence of auditing services and to prevent improper conduct. *See also* Supplemental Affidavit of Scott Fane, at 4. These statements must be taken as true.

In addition, the Northern District Court made a number of findings, which were adopted by the Eleventh Circuit, that are not supported by the record, or, at the least, resolve disputed issues of fact. These include the court's findings that CPAs are not "coercive, persuasive, or ... [able to] take particular advantage of a face-to-face situation" (Order at 7); that the dangers associated with in-person solicitation by attorneys do not exist with regard to CPAs (Order at 7); that business clients of CPAs, based upon their knowledge, are in a significantly different position than clients of attorneys (Order at 8); and that other regulatory requirements exist which can be utilized to prevent the misconduct (Order at 12). These findings establish disputed issues of material facts which cannot be resolved by summary judgment.

By contrast, judgment in favor of Petitioners is appropriate. Statutes are presumed constitutional, and if any state of facts exists to support the challenged statute, the statute must be upheld. As set forth above, because Florida has a clear and compelling interest in the prohibition, which prohibition is narrowly tailored to the evil sought to be remedied, judgment in favor of Petitioners is appropriate.

CONCLUSION

For the foregoing reasons, Florida's prohibition on uninvited, in-person solicitation should be declared constitutional, or alternatively, the Eleventh Circuit's decision should be reversed and remanded for a trial as disputed issues of fact remain.

Respectfully submitted,

KENNETH R. HART and
STEVEN P: SEYMOE of
Ausley, McMullen, McGehee,
Carothers & Proctor
Post Office Box 391
Tallahassee, FL 32302
904-224-9115

ATTORNEYS FOR AMICUS CURIAE
FLORIDA INSTITUTE OF CERTIFIED
PUBLIC ACCOUNTANTS

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